INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Sorrells v. *United States*, 287 U.S. 435	6, 7
United States v. *Chiarella*, 184 F. 2d 903, vacated for resentencing, 341 U.S. 946	6
United States v. *Grayson*, 166 F. 2d 863	7
United States v. *Spadafora*, 181 F. 2d 957, certiorari denied, 340 U.S. 897	6

Statute and Rule:

26 U.S.C. 2554 (a)	2
Rule 51, F. R. Crim. P.	7

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 312

ADELAIDA LITA DEMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 77-84) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1953 (R. 84) and a petition for rehearing was denied on August 6, 1953 (R. 87). The petition for a writ of certiorari was filed on September 3, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the petitioner's conviction of selling heroin not in pursuance of a written order form as required by statute.

2. Whether the trial court erred in submitting the issue of entrapment to the jury under proper instructions.

3. Whether the trial court erred in not excluding on its own motion evidence of a transaction relating to stolen groceries which immediately preceded the illicit sale of narcotics, where petitioner made no objection to the admission of such evidence, at any time.

STATUTE INVOLVED

26 U.S.C. 2554(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

On October 7, 1952, a three-count indictment was returned in the United States District Court for the Western District of Texas, the first count of which charged that on or about June 12, 1952, petitioner and a co-defendant Richard A. Najera made a sale of heroin to Sam F. Stowers, which sale was not in pursuance of a written order form and

was therefore in violation of 26 U.S.C. 2554(a). The second and third counts to which Najera pleaded guilty, charged him alone with subsequent sales to Sam F. Stowers on June 15, 1952, and June 17, 1952 (R. 1-3). After a jury trial petitioner and the co-defendant were both found guilty under count one and petitioner was sentenced to five years' imprisonment as a second offender (R. 61-63). The Court of Appeals for the Fifth Circuit affirmed the conviction (R. 84).

The evidence for the Government may be summarized as follows:

Sam F. Stowers, a federal narcotics agent stationed in Dallas, Texas, testified as a Government witness that he was introduced to one Frazier in San Antonio through a letter written by a "police character" in Dallas (R. 20-21). On his arrival in San Antonio, Stowers was introduced by Frazier to the co-defendant Najera (R. 21), a heroin addict (R. 45). Although Stowers told Najera that his wife was addicted to narcotics, he did not ask Najera to procure any for him at that time (R. 22). Stowers did, however, tell Najera that his wife sold stolen groceries, and asked to be introduced to petitioner, who, he understood engaged in such transactions (R. 23).

The evidence does not reveal that anything was done as a result of this conversation. About 8:30 P.M. on June 12, 1952, however, Stowers went to a grocery store and purchased $57.41 worth of groceries. He then drove to the vicinity of petitioner's home, the address of which he had previ-

ously obtained from Frazier. (R. 7, 24.) As Stowers was parking his car, Najera drove up (R. 7-8). Stowers told Najera that he had a load of groceries in the back of his car and that he had to get rid of them (R. 13). Stowers then walked to the front door of petitioner's house, and when she came to the door, introduced himself by an alias name and told petitioner that he had a quantity of groceries in his car that he wanted "to get rid of" and asked for help in carrying them inside. At that moment Najera arrived and after a brief conversation with petitioner in Spanish, helped carry them into the house. (R. 8-9, 13-14.) After petitioner paid Stowers for the groceries at half of their value, Stowers told petitioner that his wife had stolen the groceries, that she was a dope addict, and needed drugs. Stowers also said that he was wanted by the police in Dallas (R. 14-15). Stowers asked her whether a gram of the "stuff" would sell for about $30 or $35, and she replied in the affirmative. Then Stowers asked her to help him obtain some and she replied (R. 16), "Go out on the front porch and wait, and I will call Kios" [Najera]. Stowers and Najera then walked out on the porch together. Najera asked how much Stowers wanted, and the latter replied that he wanted one gram; Najera told Stowers to meet him at a street corner nearby. Stowers went to that place, and about a moment after his arrival he was again met by Najera who came up on foot and handed him two cellophane packages for which Stowers paid him $30. (R. 16-17, 27-28.) It was stipulated on the trial that the

packages contained heroin sold without an order form (R. 19).

On June 17, 1952, Stowers met petitioner at the same corner where he had purchased the heroin before and offered her $90 for three more grams. She refused this offer saying she might lose the money, but she offered to contact Najera and have him deliver the heroin that night. (R. 17-18.) Stowers called petitioner later about the heroin and she said she could not locate it (R. 18). Other attempts to buy heroin from petitioner also failed. On each attempt, Stowers testified (R. 33), "She always left it in the balance, so to speak."

ARGUMENT

1. Despite petitioner's failure to move for a directed verdict on the trial of this case on the ground of insufficiency of the evidence, the Court of Appeals reviewed the evidence and found it sufficient to sustain the conviction. Petitioner's present contention of insufficiency (Pet. 5-11) is amply met by the opinion below (R. 77-84), and warrants no further review.

The evidence establishes the complicity of petitioner in the sale alleged in the first count of the indictment. It was she who answered Stowers' inquiry, made during the course of another transaction, as to the price of heroin. When Stowers asked her about obtaining some, she readily called Najera who was visiting her home, and with whom the evidence shows she was on familiar terms. The sale was transacted a short distance from petition-

er's house under circumstances which indicate that Najera came directly from there with the heroin. In short, the evidence fully justifies the conclusion that it was petitioner who was the principal in the sale.

2. Petitioner contends (Pet. 11-14) that the defense of entrapment should not have been submitted to the jury under instructions (see R. 49-50), but should have been disposed of as an issue of law. As this Court held in *Sorrells* v. *United States,* 287 U.S. 435, 452, however, the issue of entrapment is one to be resolved by the jury under proper instructions as to the law. Petitioner does not assert that the instruction given is not a correct statement of the law, and it must be presumed that the jury followed the instructions and found as a fact that entrapment did not exist. *United States* v. *Spadafora,* 181 F. 2d 957, 959 (C.A. 7), certiorari denied, 340 U.S. 897.

It is clear that the evidence supports the jury's verdict. There is no entrapment where the accused is already engaged (1) in an existing course of similar criminal conduct, (2) had already formed a design to commit the crime or similar crimes; or (3) was willing to do so as evidenced by ready complaisance. *United States* v. *Chiarella,* 184 F. 2d 903, 908 (C.A. 2), vacated for resentencing, 341 U.S. 946. Clearly under the instant facts the petitioner was already engaged in similar illicit activity, and evidenced ready complaisance when the transaction was broached by Stowers. Her readiness to engage in crime is shown by her knowledge of the price of

heroin and her promptness, when asked about a sale, in calling Najera. She can hardly contend that she was led into crime by a government agent when the evidence indicates that she and Najera, her co-defendant, were already in possession of the heroin when the subject was brought up. In short the criminal design neither originated with a government officer nor did an officer "* * * implant in the mind of an innocent person the disposition to commit the alleged offense * * *." *Sorrells* v. *United States, supra* (287 U.S. at p. 442).

3. Finally, petitioner contends, apparently for the first time, that the trial court erred in admitting evidence as to the sale of groceries by Stowers to petitioner. Such evidence was, however, highly relevant since this transaction which immediately preceded the narcotics transaction, explains the meeting between Stowers and petitioner, the entry of Najera on the scene, and the other events leading up to the sale of narcotics. The Court of Appeals for the Second Circuit in addressing itself to an analogous situation said "* * * it is never a ground of objection to evidence directly relevant to the crime that it exposes the accused to odium, or even implicates him in another crime." *United States* v. *Grayson,* 166 F. 2d 863, 867. It is significant that no objection to the admission of such evidence was made at the trial or before the Court of Appeals. See Rule 51, F. R. Crim. P.

CONCLUSION

This case was decided under established legal principles, and further review is not called for. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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